

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-1314**

HARRY GOODKIN & Co.

Petitioners,

against

ROBERT ABRAHAMSON AND MARJORIE ABRAHAMSON

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

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Petitioner, Harry Goodkin & Company (hereinafter referred to as "Goodkin"), respectfully prays that a Writ of of Certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit, insofar as it reverses an order of the United States District Court for the Southern District of New York, dismissing the respondents' cause of action against Goodkin under § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 and § 214 of that Act, 15 U.S.C. § 80b-14.

Opinions Below

The opinion of the District Court (A54-74) is reported at 392 F. Supp. 740.

An interim opinion of the Court of Appeals (A75-78), which reserved decision pending filing of supplemental

briefs by the parties and an amicus curiae brief by the SEC in view of the "importance and novelty of the issues under the Advisers Act", is reported at 537 F.2d 27.

The main opinion of the Court of Appeals (A3-49) has not yet been officially reported; it is unofficially reported at CCH Fed. Sec. Law Rep. (1976-1977) Transfer Binder, ¶95,889. This opinion was modified by an order of the Court of Appeals (A50-52) which also has not yet been officially reported.¹

Jurisdiction

The judgement of the United States Court of Appeals for the Second Circuit was entered on February 25, 1977. The order modifying the Court of Appeals' decision was entered on January 13, 1978. This Court's jurisdiction to review the decision below is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Goodkin is a firm of certified public accountants and presents the following question specifically applicable to Goodkin:

Whether a private right of action for damages lies under the Investment Advisers Act of 1940, as amended, against persons who are not investment advisers, when the legislative history of the Act indicates explicit Congressional rejection of such a right.

In all other respects, Goodkin respectfully adopts the questions presented by the Investment Adviser defendants.

1. All of the foregoing orders and opinions appear in the joint Appendix submitted with the petition of the petitioners Fleschner, Becker, Fleschner Becker Associates and Ehrlich (hereinafter referred to as the "Investment Adviser defendants"). References to page numbers in the Appendix are given as "A" followed by the page numbers.

Statutes Involved

Section 206 of the Investment Advisers Act of 1940, 54 Stat. 852, as amended, 74 Stat. 887, 15 U.S.C. § 80b-6, and Section 214 of that Act, 54 Stat. 856, 15 U.S.C. § 80b-14. These sections are set forth in the joint appendix submitted with the petition of the Investment Adviser defendants. (A 1-2)

Statement of the Case

The sole consideration given by the Court of Appeals with respect to the question of whether a private right of action for damages may be implied under the investment Advisers Act of 1940 against persons, such as accountants, who are not investment advisers, is found in footnote 16 of the main opinion. There, the Court held that Goodkin could be held liable under a theory of aiding and abetting, irrespective of the limitation of Section 206 to investment advisers. In other respects, Goodkin respectfully adopts the Statement of the Case of the Investment Adviser defendants.

Reasons Relied on for Allowance of the Writ

The effect of the Court of Appeals' decision is to permit lawsuits, in federal courts, against a class of professionals, namely accountants, upon whom Congress never intended to impose civil liability, when acting solely in the practice of their profession, and whose subjection to liability is unconnected with any express regulatory purpose of the Investment Advisers Act. The Court of Appeals relied upon

the theory of aiding and abetting to permit private civil liability. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), this Court left unresolved the question of whether "civil liability for aiding and abetting is appropriate" in the case of violations of the federal securities laws. 425 U.S. 191, n. 7.

In enacting the 1960 amendments to the Investment Advisers Act of 1940, Congress specifically rejected a proposed amendment which might have been construed as creating a private right of action against aiders and abettors. The language of the original bill to amend the Act differed markedly from the language of the amendments that were finally enacted with respect to the treatment of aiders and abettors. The original bill contained a proposed new subsection (d) to section 208 which, in pertinent part, stated: "[I]t shall be unlawful for any person to aid, abet, counsel, command, induce or procure the violation of the provisions of this title or any rule or regulation thereunder by any other person."² The enacted amendment merely states that: "It shall be unlawful for any person indirectly, or through or by any other person to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title or any rule or regulation thereunder." Section 208(d), Investment Advisers Act of 1970, 15 U.S.C. 80 b-8(d). The congressional history explicitly states that the language was specifically changed in order to "[m]ake it clear that no civil liability to private individuals is intended."³

The judicial implication of a private right of action against alleged aiders and abettors, under the Act, will expose accountants and other professionals to a hazard, from which, Congress expressly acted to protect them.

2, 3. Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate, Eighty-Sixth Congress, First Session, on S.1178, S.1179, S.1180, S.1181, and S.1182 at 517-18.

Conclusion

The petition should be granted and a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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March 14, 1978

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